In the

Supreme Court

of the

United States

October Term 1968

No. 1277

LOUIE L. WAINWRIGHT, Director
Division of Corrections,

Petitioner,

vs.

FREDERICK KEITH CALLOWAY,

Respondent.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MIAMI REVIEW — [illegible]

INDEX

	Page
QUESTION PRESENTED	1
JURISDICTION	2
ARGUMENT	2
CONCLUSION	8
CERTIFICATE OF MAILING	9

CASES AND AUTHORITIES

	Page
Brookhart v. Janis, 384 U.S. 1, 4, (1966)	2
Carnley v. Cochran, 369 U.S. 506, 514, (1962)	3
Diggs v. U. S., 242 U.S. 470, (1917)	4
Dyson v. U. S., 283 F.2d 636, (C.A. 9, 1960)	4
Gardner v. Broderick, 392 U.S. 273, (1968)	6
Garrity v. New Jersey, 385 U.S. 493, (1967)	4
Glasser v. U. S., 315 U.S. 60, 70, (1942)	3
Jackson v. Denno, 378 U.S. 368, (1964)	5
Johnson v. Zerbst, 304 U.S. 458, 464, (1938)	2
Jones v. U. S., 362 U.S. 257, 264, (1960)	3
Linkletter v. Walker, 381 U.S. 618, 638, (1965)	3
Malloy v. Hogan, 378 U.S. 1, 8, (1964)	3
Miranda v. Arizona, 384 U.S. 436, 460, (1966)	3
Simmons v. U. S., 390 U.S. 377, (1968)	4, 5
Spevak v. Klein, 385 U.S. 511, 515, (1967)	4
U. S. ex rel. Glockley v. Meyers, 378 F.2d 398, 399, (C.A. 3, 1967)	2

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QUESTION PRESENTED

The question in this case is whether the prosecutor's comments on respondent's failure to testify on the issue of guilt or innocence violated the self-incrimination clause of the fifth amendment. Our answer is that the law permitted the respondent (hereafter defendant) to give evidence that his confession was involuntary without opening the door to the prosecution to comment on his guilt or innocence.

JURISDICTION

Defendant maintains (a) that in the present constitutional law context there is no conflict between the federal court circuits on the question, and (b) that since Florida has not decided "whether or not it will follow the law of limited waiver" the federal rule applies and supplies the answer. (App. 16) The absence of state court decisions on this point does not support an inference of conflict.

ARGUMENT

It is no longer open to question that a defendant has the constitutional right to contest an alleged confession. In Florida under the "humane" rule, after the judge makes an initial determination that a confession is admissible, the jury is required to reconsider the confession only with respect to its credibility. Once an assault is made on a confession, a defendant's testimony becomes clearly indispensable to his claim that he was forced to confess. And once he testifies what can be more natural in the setting of the question than the defendant's testimony that during the process of interrogation he denied his guilt.

Such testimony is directed to the limited purpose of protecting the constitutional right and not to the merits of guilt or innocence. Such testimony does not amount to a waiver, which has been classically defined as the intentional or voluntary relinquishment of a known right. **Brookhart v. Janis,** 384 U.S. 1, 4, (1966); **Johnson v. Zerbst,** 304 U.S. 458, 464, (1938); U.S. ex rel. **Glockley v. Meyers,** 378 F.2d 398, 399, (C.A. 3, 1967).

Quite the contrary, today we are required to make every reasonable assumption against the waiver of constitutional rights. **Carnley v. Cochran,** 369 U.S. 506, 514, (1962); **Glasser v. U.S.,** 315 U.S. 60, 70, (1942).

To permit comment by the prosecutor on the issue of guilt or innocence because a defendant relates what happened during interrogation would require the defendant to give up his right to challenge the confession on pain of forfeiting his constitutional right to fifth amendment silence.

When a defendant moves to suppress he merely questions the method by which the confession was obtained. His motion is "not immediately relevant to the question of guilt", **Jones v. U.S.,** 362 U.S. 257, 264, (1960), because the exclusionary rule "has no bearing on guilt", **Linkletter v. Walker,** 381 U.S. 618, 638, (1965). **Malloy v. Hogan,** 378 U.S. 1, 8, (1964), teaches that a defendant is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will and to suffer no penalty . . . for such silence". **Miranda v. Arizona,** 384 U.S. 436, 460, (1966) is in accord.

Patently a defendant cannot know in advance the outcome of the constitutional question of admissibility and he should not be whipped for asserting the first right by exposing him to the loss of the second. If this were the case, a defendant would be deterred from advancing his claim on the confession on pain of losing his fifth amendment privilege as the price of silence. Put somewhat differently, since a defendant has the right to have an unlawful confession excluded, then, if petitioner is correct in its contention, the defendant would be forced to submit to an unconstitutional confession as the price of silence.

Additionally, the petitioner is in effect asking this court to accept jurisdiction on the thesis that a defendant may be required to run the risk of producing evidence harmful to himself as a condition of the right to contest the voluntariness of his alleged confession.

In petitioner's postulate a defendant would be torn between Scylla and Charybdis, without a true choice. **Garrity v. New Jersey,** 385 U.S. 493 (1967). In **Simmons,** 390 U.S. 377, (1968), the defendant had a similar "Hobson's" choice. Confronted by the "standing" requirement he had to either give up his fourth amendment objection or testify against himself. This court refused to sanction the exaction of the price, overruling a long line of decisions to reach this result. In **Spevak v. Klein,** 385 U.S. 511, 515, (1967) this Court had also refused to force a defendant to pay a price for invoking the fifth amendment privilege.

Petitioner relies upon **Dyson v. U.S.,** 283 F.2d 636, (C.A. 9, 1960). Dyson was predicated upon **Diggs v. U.S.,** 242 U.S. 470 decided in 1917. The fact pattern of Diggs bears no similarity to that at bar. The constitutional imperatives which we have discussed were not then involved as precedent or authority. In Diggs defendant voluntarily took the stand to deny the essence of a charge that he had transported women in violation of the White Slave Traffic Act. On direct examination by his counsel, he gave guarded testimony in which, among other things, he disclosed that he had arranged for the transportation of the group of people involved, and that they had all "agreed to catch [the] train" which took them from one state to another. (220 Fed. 552). On cross-examination, Diggs elaborated, without objection, that he had met the girls involved "frequently [during] the first week pre-

ceding the trip" (p. 553) and less frequently the second week preceding the trip, which was started two weeks after meeting one of the girls involved. Counsel for the government then asked him: "In your testimony you have referred repeatedly to conversations and conferences that took place before the Reno trip. Now what did you understand or mean about the Reno trip." Diggs lawyer objected to the question. He was overruled and Diggs replied that "It [was] perfectly evident what trip it was", and that the rest of the group had traveled with him. In the circuit court and in this court it was held that since he had voluntarily testified to facts which clearly went to the merits of the issue of guilt he could not select which of the incriminating circumstances he would disclose and hedge his testimony with respect to events already in evidence; events in which he had participated.

Moreover, Dyson has in effect been overruled by **Jackson v. Denno**, 378 U.S. 368 (1964) and **Simmons v. United States**, 390 U.S. 377 (1968), and the alleged conflict between the decision of the Court of Appeals in this case with that of Dyson is thus unsubstantial.

In Jackson, this Court stated that:

> The overall determination of the voluntariness of a confession has become an exceedingly sensitive task, one that requires facing the issue squarely, in illuminating isolation and unbeclouded by other issues and the effect of extraneous but prejudicial evidence . . . These procedures must, therefore, be fully adequate to insure a reliable and clear cut determination of the voluntariness of the confession, including the resolution of disputed facts upon which the voluntariness of the issue may depend. (pp. 390, 391).

In Simmons the defendant Garrett had moved to keep out of evidence a suitcase and its contents uncovered during an allegedly unlawful search. To achieve standing to do so, he had to admit ownership. The District Court denied his motion to suppress and the testimony which he gave to controvert the legality of the search was admitted against him at his trial. This court ruled that the testimony which he gave in the hearing to exclude evidence on Fourth Amendment grounds could not be used against him at the trial itself.

In **Gardner v. Broderick,** 392 U.S. 273, (1968), this court refused to uphold a penalty imposed upon a policeman because and solely because he refused to waive his privilege against self-incrimination while in Garrity, 385 U.S. 493, (1967) this court also held "that when a policeman had been compelled to testify by the threat that otherwise he would be removed from office, the testimony that he gave could not be used against him in a subsequent prosecution." (p. 1086).

The suggestion that defendant invited comment when, in repeating what happened during his interrogation, he said he "didn't do it" (App. 14, Note 2), flies in the face of common sense. If a defendant contesting voluntariness is prevented from relating what transpired during his interrogation, then a hearing to determine the issue of voluntariness is a hollow exercise.

The defendant's testimony given for the limited collateral purpose of explaining how his already introduced confession was obtained from him is not testimony on the merits, and it was error for the trial judge to permit the prosecutor to comment on the defendant's silence on other matters which went to the merits.

Petitioner rationalizes that if the decision below is permitted to stand a defendant will "be able to pick and choose which evidence introduced by the state he will challenge — all without waiving his privilege against self-incrimination". (br. p. 6). This sweeping locution fails to make the obvious distinction between testimony on the issue of voluntariness and that of guilt. Since the defendant's testimony in this case was in the orbit of voluntariness, petitioner's argument is irrelevant to the question presented.

CONCLUSION

The petition should be denied because the question presented has already been settled by this court, adversely to petitioner.

Respectfully submitted,

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Julius L. Goldstein,
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CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was mailed to CHARLES W. MUSGROVE, Assistant Attorney General 321-A Pan-A Building, West Palm Beach, Florida, Counsel for Petitioner, this day of , A. D., 1969.

J. LEONARD FLEET